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SUPREME COURT, U.S.

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In the

Supreme Court of the United States

October Term, 1952

No. 252

Dan C. Cameron, Petitioner

v.

Frank J. Rizzo, Respondent

Dan C. Cameron,
Petitioner,
[illegible]
[illegible]

INDEX

	Page
Opinions below	1
Jurisdiction	2
Questions presented	2
Constitutional provisions, statutes and rules	3
Statement	4
Reasons for granting the writ	6
Conclusion	14
Appendix A	15
Appendix B	17
Appendix C	17

CITATIONS

Cases:

Aero Design & Engineering Co. v. Oklahoma Employment Security Commission, 151 F.Supp. 844 Aff. 353 U.S. 943	13
American Railway Express Co. v. Kentucky, 273 U.S. 269	11
Atchison, T. & S.F. Ry. Co. v. Weeks, 254 Federal 543 Cert. Den. 249 U.S. 602	10
Chicago Ornamental Iron v. Rook, Admr. 93 O.S. 152	12
Christman v. Coleman, 117 O.S. 1	7
Earl v. McVeigh, 91 U.S. 503	9,11
Griffin v. Griffin, 327 U.S. 220	12
Haff v. Fuller, 45 O.S. 495	7
Joley v. Martin Brothers Box Co., 158 O.S. 416	9
Kibbe v. Benson, 17 Wall 624	6
Kingsborough v. Tousley, 56 O.S. 456	6,7,9,14
Kletchko v. Shupp, 15 Ohio Nisi Prius (N.S.) 332	10
Lawrence v. State Tax Commission, 286 U.S. 276	11
McDonald v. Mabee, 243 U.S. 90	11

INDEX (continued)

Page

McDonald v. Oregon Railroad Navigation Co., 233 U.S. 665 10

Miller v. Longacre, 26 O.S. 291 10

Missouri & Kansas Railway v. Elliott, 184 U.S. 530 .. 13

Phillips v. Nagely, 117 U.S. 665 7

Power & Light Co. v. Smith, 126 O.S. 601 8

Robb v. Voss, 155 U.S. 13 7,14

Sours v. State Director of Highways, 82 Ohio Law Abstract 594 10

Spier v. Corll, 33 O.S. 236 7,9

Spring Valley Coal Co. v. Donaldson, 123 Ill. App. 196 9

State v. Mansfield, 89 O.S. 20 12

State ex rel Spector v. Smedes, 17 O.D. 757 8

Travis et al v. Public Utilities Commission, 123 O.S. 355 12

Truax v. Corrigan, 257 U.S. 312 14

United States v. Maier, 18 C.C.P.A. Customs, 409 .. 9

Van Ingen v. Berger, 82 O.S. 253 12

Wagner v. Armstrong, 93 O.S. 443 8

Ward v. Board of County Commissioners, 253 U.S. 17 11

Young v. Guella, 67 O. App. 11 8

TEXTS:

Freeman on Judgments, Volume 1, page 613, Section 308 7

CONSTITUTIONAL PROVISIONS AND STATUTES:

28 U.S.C.A. Section 1257 (3) 2,3

Fourteenth Amendment to the Constitution of the United States 3

Article 4, Section 2, of the Constitution of Ohio 3,11,12,13,14

Ohio Revised Code Section 1915.04, Appendix B 3,8

Ohio Revised Code Section 1911.05, Appendix C 3,10

IN THE

Supreme Court of the United States

October Term, 1962

No. .....

ORIN C. CLEMENS, *Petitioner*

EVANS J. FISHER, *Respondent*

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

Petitioner prays that a writ of certiorari issue to review the judgment of the Supreme Court of Ohio made and entered in the above case on February 14, 1962.

Opinions Below

The Court of Appeals of Lucas County, Ohio, rendered no opinion in affirming the judgment of the trial court sustaining a demurrer to plaintiff's petition on the ground that the trial court was without jurisdiction because plaintiff had an adequate remedy at law. The judgment of the Court of Appeals is not reported.

The Supreme Court of Ohio rendered no opinion but a copy of the judgment which petitioner seeks reviewed is contained in Appendix A. The case is reported at 173 O.S. 220.

Jurisdiction

The judgment of the Supreme Court of Ohio was made and entered on February 14, 1962. Application for rehearing was timely filed February 28, 1962, and the rehearing was denied March 7, 1962, refusing to allow the filing of a supporting brief. The jurisdiction of this Court is invoked under 28 U.S.C.A. 1257 (3).

Questions Presented

Petitioner is claiming that due process of law under the Constitution has been denied him by the entry of a default judgment against him without service of process on him, and therefore without jurisdiction, depriving petitioner of his day in court and the opportunity to be heard in defense. Because petitioner filed a motion to vacate the default judgment as soon as he learned of it, and after the court had lost control over the judgment, respondent claims the remedy was by appeal and not in equity for an injunction. Respondent prevailed in the state courts. The questions presented are:

1. Whether petitioner's action to enjoin the default judgment entered without service of process, and for that reason, without jurisdiction, has the character of an appeal from the denial of petitioner's motion to vacate the default judgment.

2. Whether the action to enjoin the judgment, void for lack of jurisdiction because of no service, is the proper remedy provided for redress from the denial of his right to his day in court.

3. Whether the existence of an adequate remedy at law is of material importance in determining jurisdiction in view of the latent defect of service of process foreclosing jurisdiction as well as disclosing the denial of due process.

4. Whether respondent's demurrer is grounded on any principle of law which can deny petitioner's right to have the judgment, void for lack of jurisdiction, inquired into in an original action in a court of competent jurisdiction.

5. Whether the defect in service of process not appearing on the face of the record, preventing notice and an opportunity to be heard and to defend, is a denial of due process of law under the Fourteenth Amendment to the Constitution of the United States.

6. Whether the obligatory appellate jurisdiction of the Supreme Court of Ohio, when invoked on the question of denial of due process under the Constitution because of lack of service of process, can be restricted in scope and the appeal denied on the ground that no debatable constitutional question exists.

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES

28 U.S.C.A. Section 1257 (3)

Fourteenth Amendment to the Constitution of the United States.

Article 4, Section 2, of the Constitution of Ohio

Ohio Revised Code Section 1915.04, Appendix B

Ohio Revised Code Section 1911.05, Appendix C

Statement

On the ground that his basic constitutional right to have his day in court and be heard in defense had been denied him, petitioner filed his original action in equity to enjoin the enforcement of a default judgment rendered against him in a County Court, successor in Ohio to the Justice of the Peace Court. There was no service of process on him or notice of the pendency of the proceedings in the County Court, although the return of the constable, on its face, showed good and valid service by leaving a copy of the summons at the therein defendant's usual place of residence. The summons was in fact left in an unused mailbox constructed in the wall of petitioner's house at the porch entrance. His house and place of residence sets back 200 feet from the street curb where petitioner's mail is regularly delivered in a rural type mailbox under United States Postal regulations. The porch mailbox has never been used and there has never been any reason to use or open it. A month after the date the County Court record shows residence service was made, which was after the entry of the default judgment and also after the County Court had by statutory lapse of time lost control over its judgment, the summons was accidentally discovered by petitioner. Upon this discovery petitioner, though without any authorization in law, but to take action against the default judgment, promptly filed a motion in the County Court to vacate the default judgment, appearing solely for the purpose of the motion. The motion was denied. Petitioner then prepared and filed the within action for equitable relief from the void judgment.

Respondent demurred on the ground that equity was

without jurisdiction, contending that there was an adequate remedy at law by appeal from the County Court's denial of the motion to vacate the judgment, and that the within action is in reality an appeal from the order denying the motion to vacate the judgment and, as such, an attempt to use equity as a substitute for an appeal.

These contentions are at once confronted with settled rules of law withholding any authority in the County Court to entertain the motion to vacate its judgment after it had lost control over its judgment, making the order denying the motion a mere nullity, and obviously foreclosing any appeal therefrom; and confronted also with the principle that there can be no adequate remedy at law, where the defect in service does not appear on the face of the record, as here, but must be otherwise shown by extrinsic facts, and that showing cannot be made on appeal since the record on appeal speaks complete verity and an appeal would be dismissed; and confronted, further with the settled rule that jurisdiction in equity to attack a judgment void for lack of jurisdiction to render it is an ancient and original remedy in equity independent and irrespective of any remedy at law which is simply cumulative under code provisions.

The right of appeal, which generally satisfies due process, is non existent under the law and facts of this case. There is no dispute in the facts. The basic facts are admitted by the demurrer, making the County Court record unnecessary.

The trial court sustained the demurrer. The Court of Appeals affirmed without opinion. On appeal to the Su-

preme Court of Ohio as of right as involving a question arising under the Constitution, the appeal was dismissed as not presenting a debatable constitutional question, though the petition specifically claims the denial of his day in court and the opportunity to be heard in defense.

The time for filing petition for writ of certiorari was by order of this Court of May 7, 1962 extended to and including June 30, 1962; and by order of this Court of June 22, 1962, was further extended to and including July 14, 1962.

The Ohio courts have failed to give effect to pertinent and controlling law in this case basically arising from the lack of jurisdiction of the County Court to render judgment, and have allowed technical rules of law to blur the Court's vision of the value and significance of petitioner's private rights under the Constitution. A constitutional right may never be nullified by a technical rule of law.

Reasons For Granting The Writ

The decision of the Supreme Court of Ohio should be reviewed because it erroneously rests, perhaps, on untenable non-federal grounds in disregard and avoidance of a federal right specifically asserted and claimed by petitioner. The decision fails to follow and does reject, without overruling, the principles of law pronounced in *Kingsborough v. Tousley*, 56 O.S. 450, following federal authorities, and *Kibbe v. Benson*, 17 Wall 624, that where a judgment is rendered without service of process and the defect in the service does not appear on the face of the record but must be shown by extrinsic facts, appeal pro-

vides no adequate remedy. The decision evades the Ohio Supreme Court's obligatory jurisdiction involving a question arising under the Constitution of the United States, and of Ohio, enjoined by the Constitution of Ohio relating to petitioner's fundamental right to his day in court. A decision based on the obvious misapplication of settled rules of law involving and denying fundamental individual rights and evading jurisdiction enjoined by the Constitution of Ohio for the protection of these rights, should be reviewed.

1 & 2. Petitioner in this action seeks an injunction against the enforcement of a default judgment entered without service of process on the defendant. The lack of service is not disputed. The equitable character of the action is self evident. The remedy sought is anciently cognizable in equity and pursues relief not obtainable in a law court. *Christman v. Coleman*, 117 O.S. 1, 9-10. The allegations pose an original action in equity and a direct attack on the County Court's judgment as void for want of jurisdiction to enter it. *Spicer v. Corll*, 33 O.S. 236. Only in equity can the lack of jurisdiction be shown by showing contrary to the record in the County Court, by extrinsic facts, that service of process was not made on the defendant. *Kingsborough v. Tousley*, 56 O.S. 450. This is a rule of universal application and forecloses any adequate remedy at law under the admitted facts of this case. *Hall v. Fuller*, 45 O.S. 495, 497-98. Freeman on Judgments, Volume 1, page 613, section 308. The remedy, where extrinsic evidence is required to show the defect in service, contrary to the record, is properly in equity. *Robb v. Voss*, 155 U.S. 13. *Phillips v. Negley*, 117 U.S. 665.

Every aspect of petitioner's action, procedural as well as of the substance and the relief sought, refutes any element of an appeal. It is not a proceeding in the same cause, the objective is different, it does not disturb the default judgment or the order on the motion to vacate the judgment. The proceeding only renders the judgment ineffective, wholly different in purpose from an appeal.

Respondent's contention that this action is in reality an appeal from the County Court's order dismissing the motion to vacate the default judgment is a novel theory of the application of appellate procedure. Obviously, it is untenable.

3. In seeking relief in equity from the default judgment, petitioner pursues a remedy long the special province of equity. The remedy in equity was known to the law before the remedy by special proceedings was provided by the Code and it is settled that these statutory proceedings are merely cumulative and do not exclude or affect the equitable jurisdiction of the court. *Power and Light Co. v. Smith*, 126 O.S. 601, 611, *Wagner v. Armstrong*, 93 O.S. 443, 455. Whether petitioner had an adequate remedy at law by proceedings in the County Court or by appeal, is of no material importance in determining the jurisdictional right of a court of general equity jurisdiction to intervene to enjoin this void judgment. *Young v. Guella*, 67 O. App. 11.

This applies with greater force in this case because appeal is futile to show by extrinsic facts the lack of service, and it cannot be corrected in the court rendering the judgment because the Court had lost control of its judgment when the County Court proceedings were first discovered. *State ex rel Spector v. Smedes*, 17 O.D. 757, Ohio Revised Code Section 1915.04 (Appendix B).

Irrespective of whether petitioner had an adequate remedy at law, the Common Pleas Court, being a court of general equity jurisdiction, possesses full jurisdiction of petitioner's action to enjoin the void judgment. *Kingsborough v. Tousley*, 56 O.S. 450, *Earl v. McVeigh*, 91 U.S. 503.

The motion to quash service and vacate the default judgment though without authorization in law, was an expedient means, with the consent of the plaintiff in that court, respondent here, of correcting the illegal process and effecting legal service and a trial on the merits; but the consent was withheld and the motion contested. The overruling of this motion, however, was of no consequence. It was a mere nullity. It was based on a judgment void for lack of jurisdiction, as well as entered after the County Court had lost control over that judgment. The filing of this motion by petitioner surrenders no right he had. *Joley v. Martin Brothers Box Company*, 158 O.S. 416. Nor does the denial of this motion to vacate the judgment destroy the jurisdiction of equity to entertain this action. *Spring Valley Coal Co. v. Donaldson*, 123 Ill. App. 196, *United States v. Maier*, 18 C.C.P.A. Customs, 409. The right to proceed in equity irrespective of adequate remedy at law, if any, is clear.

4. The petition in this case makes the judgment rendered by the County Court the foundation of the action. It specifically charges that the judgment is a nullity for lack of jurisdiction of the County Court because of the lack of service of process. *Spier v. Corll*, 33 O.S. 236. Under Ohio law it is a direct attack on the judgment as void for want of jurisdiction to render it. *Kingsborough v. Tousley*, 56 O.S. 450. It is long settled that the Court of Common Pleas

has jurisdiction in equity to entertain an action to enjoin the enforcement of a void judgment. *Miller v. Ewaniec*, 26 O.S. 291. *Atchison, T. & S.F. Ry. Co. v. Weeks*, 254 Federal 513, Cert. Den. 249 U.S. 602. These settled principles, tied in with the extrinsic fact of lack of service of process, exclude any room for contending that petitioner had an adequate remedy at law. The proper and only remedy available to have relief from the void judgment, under the circumstance of a defect of service of process not appearing on the record, is equity jurisdiction. The demurrer is ineffective to defeat equity's right of jurisdiction.

5. The decision of the Supreme Court of Ohio is repugnant to the Constitution of the United States in denying petitioner a federal right protected by the Constitution. The complete lack of jurisdiction of the County Court resulting from the failure of service of process on the defendant is violative of the essential elements of due process and prevents petitioner from having his day in court. *McDonald v. Oregon Railroad Navigation Co.*, 225 U.S. 665.

Process in Ohio when not personal but by leaving a copy of the summons at the defendant's usual place of residence is required to be left within the dwelling where it may fairly be presumed the defendant will receive it. Ohio Revised Code Section, 1911.05 (Appendix C.), *Kletchka v. Shupp*, 15 Ohio Nisi Prius (N.S.) 332, followed in *Sours v. State Director of Highways*, 82 Ohio Law Abstract 594.

Such a presumption does not arise when the summons is placed in an unused mailbox built in the walls of the house. It is neither being left within the place of residence

not in a place where it could fairly be presumed the defendant would receive it.

Notice of such character is not reasonable and denies any reasonable opportunity to present a defense. *McDonald v. Mabee*, 243 U.S. 90, *Earl v. McVeigh*, 91 U.S. 503.

Petitioner's right to have his day in court is denied by resting the decision on untenable non-federal grounds in clear conflict with settled fundamental principles protecting and enforcing private rights. *American Railway Express Company v. Kentucky*, 273 U.S. 269,273, and avoiding the federal question of denial of due process presented by the petition in this action. *Ward v. Board of County Commissioners*, 253 U.S. 17, 22 23. This Court has jurisdiction to review to determine if there is fair and substantial support for the decision. *Lawrence v. State Tax Commission*, 286 U.S. 276.

6. The appellate jurisdiction of the Supreme Court of Ohio is derived directly from the Constitution of Ohio. Article 4, Section 2, to the extent that it pertains to jurisdiction, provides:

> "*****It (the Supreme Court) shall have original jurisdiction in quo warranto, mandamus, habeas corpus, prohibition and procedendo, and appellate jurisdiction in all cases involving questions arising under the Constitution of the United States, or of this state, in cases of felony, on leave first obtained, and in cases which originated in the Courts of Appeals, and such revisory jurisdiction of the proceedings of administrative officers as may be conferred by law.*****"

This provision of the Constitution of Ohio confers obligatory jurisdiction on the Supreme Court of Ohio in all cases involving questions arising under the Constitution. *Travis et al v. Public Utilities Commission*, 123 O.S. 355. That provision of the Constitution of Ohio may not be restricted or enlarged by legislative action. *State v. Mansfield*, 89 O.S. 20, or by rule or order of the courts. *Van Ingen v. Berger*, 82 O.S. 255.

Section 2 of Article 4 was adopted September 3, 1912 and became effective January 1, 1913. Prior to that time, by the Ohio Constitution of 1851, the Supreme Court of Ohio had such appellate jurisdiction as was provided by law. Whatever may have been the practice and the jurisdiction of the Ohio Supreme Court under the Constitution of 1851 and the laws enacted thereunder, the appellate jurisdiction conferred by the present constitutional provisions is sufficiently broad and plain to include all cases involving questions arising under the Constitution of the United States. Obviously due process is such a question, and due process forbids any exercise of judicial power which, but for the constitutional infirmity, would substantially affect a defendant's right. *Griffin v. Griffin*, 327 U.S. 220, 231.

The gravamen of petitioner's action is the denial of due process. The right and the injury to that right, protected by the Constitution, is the question presented by the petition. The appeal to the Supreme Court of Ohio rests on that question and brings with it such other questions as the record presents. *Chicago Ornamental Iron v. Rook, Admr.*, 93 O.S. 152.

It is important to know the limitations of the judicial

power of the Supreme Court of Ohio under the plain provisions of Section 2 of Article 4 of the Ohio Constitution and whence the power is derived to deny petitioner's appeal under the facts and the pertinent law in this cause.

Petitioner insists that he is entitled to his day in court and that contemplates, as a part of the judicial process, his right to be heard in the court of last resort on the constitutional question of due process. The Supreme Court of the United States is the final judge on that question. *Acme Dessert Engineering Co. v. California Employment Security Commission*, 151 F. Supp. 844 Aff. 353 U.S. 943.

Further, the Supreme Court of Ohio, in rendering the decision and dismissing petitioner's appeal on the constitutional question of due process, of necessity decided a federal question. On whatever ground the decision was made it directly affects and denies a substantial right claimed in the state courts and there denied. *Missouri and Kansas Railway v. Elliott*, 184 U.S. 530, 534.

The jurisdiction of this Court contemplates a review of the decision of the Supreme Court of Ohio to determine if under undisputed facts, petitioner has been denied his right and privilege under the Constitution of the United States by an unauthorized assumption of judicial power contrary to the provisions of Section 2 of Article 4 of the Constitution of Ohio.

This case presents important questions of reoccurring significance to lawyers and litigants in Ohio. Ohio reports of decided cases abound in instances of dismissals of appeals on questions arising under the Constitution on

grounds that, "no debatable constitutional question exists," evading in many instances, as here, *Truax v. Corrigan*, 257 U.S. 312, questions clearly arising and made the basis of an action in equity. The important and controlling features of these questions have been recognized in Ohio in *Krasniansky v. Tausch*, Supra and by this Court in *Robb v. Voss*, Supra.

The serious question here is the failure of the Supreme Court of Ohio to follow the mandate of Section 2 of Article 4 of the Constitution of Ohio and render a determination of the issues presented. It is appropriate that this failure of responsibilities under the Constitution of Ohio should be reviewed by this Court in furtherance of the security of private rights under the Constitution of the United States, and the decision reversed and disposed of on the merits.

Conclusion

For the reasons above set forth, petitioner respectfully submits that this petition for a writ of certiorari should be granted.

Petitioner.
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APPENDIX A

THE

Supreme Court of the United States

THE STATE OF OHIO,)
)
City of Columbus,) 1962 TERM

To wit: Wednesday, February 14, 1962

OHIO C. CLARENCE,)
Plaintiff-Appellant,)
) No. 37092
vs.) APPEAL FROM THE
) COURT OF APPEALS
) FOR LUCAS COUNTY
ERNEST J. FISHER,)
Defendant-Appellee.)

This cause, here on appeal as of right from the Court of Appeals for ..... Lucas ..... County was heard in the manner prescribed by law and upon motion of the appellee to dismiss such appeal.

On consideration thereof, such appeal is dismissed for the reason that no debatable constitutional question exists herein.

It is further ordered that the ..... defendant ..... appellee ..... recover from the ..... plaintiff ..... appellant ..... his ..... costs herein expended; that a

mandate be sent to the . . Court of Common Pleas . . . . . to carry this judgment into execution; and that a copy of this entry be certified to the Clerk of the Court of Appeals for . . Lucas . . County for entry.

I, John W. McMillan, Clerk of the Supreme Court of Ohio, certify that the foregoing entry was correctly copied from the Journal of this Court.

Witness my hand and the seal of the Court
this 21st. day of February 1962

.....Clerk

.....Deputy

APPENDIX B

OHIO REVISED CODE SECTION 1915.04

Revised Code Section 1915.04 **Setting aside judgment.** When judgment has been rendered against a defendant in his absence, it may be set aside by the County Judge upon the following conditions:

A. That within ten days after the judgment was entered, the defendant's motion in writing sworn to by the defendant, his agent, or attorney is filed, setting forth a sufficient reason for the absence of the defendant;

B. That the defendant pays or confesses judgment for the costs awarded against him;

C. That the defendant in writing notify the plaintiff, his agent or attorney of the opening of such judgment, and of the time and place of trial, at least five days before the time, if the party resides in county; if the plaintiff is not a resident of the county, the defendant shall notify the plaintiff, his agent, or attorney by leaving a written notice thereof at the office of such Judge ten days before the trial. The judgment shall not be set aside more than once because of the absence of the defendant.

APPENDIX C

OHIO REVISED CODE SECTION 1911.05

Revised Code Section 1911.05. The summons in an action before a judge of a County Court is returnable not more than twelve days from its date, and unless accompanied with an order of arrest, such summons shall be served at least three days before the time of appearance by delivering a copy thereof to the defendant, with the endorsements thereon, and certified by the constable or person serving it to be a true copy, or by leaving it at such defendant's usual place of residence. An acknowledgment on the back of the summons, or the voluntary appearance of a defendant, is service.

IN THE

Supreme Court of the United States

October Term, 1962

No. .....

ORIN C. CLEMENT, *Petitioner*

v.

FRANK J. FISHEL, *Respondent*

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

ACKNOWLEDGMENT

I, attorney of record for respondent herein, hereby acknowledge receipt of a copy of petition for writ of certiorari to the Supreme Court of Ohio herein, this ..... day of July, 1962.

.....